

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN TOTIN,

Plaintiff,

-v-

OXFORD PROPERTY GROUP LLC and SAGI
PARIENTE,

Defendants.

21 Civ. 3129 (PAE) (KHP)

ORDER

PAUL A. ENGELMAYER, District Judge:

Before the Court is the August 12, 2021 Report and Recommendation of Magistrate Judge Katharine H. Parker, recommending that defendant Sagi Pariente’s counterclaim be dismissed with prejudice. Dkt. 29 (the “Report”). For the following reasons, the Court adopts the Report’s recommendation in full.

I. Background

On April 11, 2021, plaintiff Brian Totin, a photojournalist and real estate agent, filed the complaint in this case. Dkt. 1. It brings claims of copyright infringement and unjust enrichment for defendants’ unauthorized and willful use of Totin’s photographs. On May 18, 2021, Pariente filed an answer to the complaint and a counterclaim for “harassment” against Totin. Dkt. 15. On June 8, 2021, Totin filed a motion to dismiss the counterclaim, Dkt. 17, and a memorandum of law in support, Dkt. 18. On July 22, 2021, Pariente filed a memorandum of law in opposition. Dkt. 24.

On August 12, 2021, Judge Parker issued the Report. The Court incorporates by reference the summary of the facts provided in the Report. The Report recommended that Pariente’s counterclaim be dismissed with prejudice. Report at 1. That is because “New York

does not recognize a common-law cause of action for ‘harassment,’” *id.* at 4 (collecting cases), and Pariente’s counterclaim was in fact rebutting the claims brought against him, *id.* at 4–5. Pariente thus did not sustain his burden of making a legally cognizable counterclaim. *Id.* at 5.

II. Discussion

In reviewing a Report and Recommendation, a district court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). “To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” *Ruiz v. Citibank, N.A.*, No. 10 Civ. 5950 (KPF), 2014 WL 4635575, at *2 (S.D.N.Y. Aug. 19, 2014) (quoting *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009)); *see also, e.g., Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

As no party has submitted objections to the Report, review for clear error is appropriate. Careful review of Judge Parker’s thorough and well-reasoned Report reveals no facial error in its conclusions; the Report is therefore adopted in its entirety. Because the Report explicitly states that the parties “shall have fourteen days” to object and “failure to file these timely objections will result in a waiver of those objections for purposes of appeal,” Report at 6, the parties’ failure to object operates as a waiver of appellate review. *See Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) (citing *Small v. Sec’y of Health & Hum. Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam)).

The Court therefore dismisses Pariente’s counterclaim with prejudice. Such dismissal is appropriate because repleading would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (“The problem with Cuoco’s causes of action is substantive; better pleading will not

cure it. Repleading would thus be futile. Such a futile request to replead should be denied.”)
(citing *Hunt v. Alliance N. Am. Gov’t Income Tr.*, 159 F.3d 723, 728 (2d Cir. 1998)).

CONCLUSION

For the reasons stated herein, the Court adopts the Report in full. Pariente’s counterclaim is dismissed with prejudice.

The Clerk of the Court is respectfully directed to close the motion pending at docket 17.

SO ORDERED.


PAUL A. ENGELMAYER
United States District Judge

Dated: January 14, 2022
New York, New York